IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1442 OF 2005
IN
SUMMARY SUIT NO. 2696 OF 1996

Mr. Sataprakash Sharma.] .. Plaintiff

Versus

Mr. Dev Anand.] .. Defendant

Mr. R.R. Sharma for the plaintiffs.

Mr. Sanjay Jain i/b Malvi Ranchoddas & Co. for the defendant.

CORAM: ANOOP V. MOHTA, J.

DATED: 18TH MARCH, 2006

P.C. :

. This Notice of Motion is taken out in Summary Suit No.2696 of 1996 by the defendant who also prays for condonation of delay in filing the Notice of Motion to set aside the exparte decree passed by this Court on 17th November, 1997.

2. Learned counsel appearing for the defendant in support of the Notice of Motion contended based on the Affidavit filed in support of the Notice of Motion that the defendant's erstwhile Advocate Mr. D. Gama, who

handled the matter, left for Australia without any intimation. The office or the agents of the defendant used to call and enquire about the matter. There was nothing communicated specifically about the progress of the matter. That resulted into the exparte decree in question. It is very clear from this Affidavit itself that admittedly after the receipt of the Writ of Summons from this Court, through the erstwhile Advocate Mr. D. Gama, was appearing in the Court. This knowledge of the litigation between the parties in question, therefore, cannot be overlooked to accept the defence that the defendant had no further knowledge about the progress of the suit. In the Affidavit, there is no material placed on the record to justify what happened between the period 1996 to 15th February, 2005.

3. As contended, the defendant was surprised and shocked when he was served on 15th February, 2005, a Notice dated 23rd December, 2005, under Order XXI Rule 22, Civil Procedure Code, issued by this Court for an execution, based on the exparte decree which was passed on 17th November, 1997 in the suit in question; the defendant thereafter immediately tried to contact the erstwhile Advocate; it was one Mr. Ramesh Singh who informed about the erstwhile Advocate Mr. D. Gama by letter dated 25th February, 2005, that Mr D. Gama had

migrated to Australia. There is no other material placed on the record to justify what happened during this period. Therefore, these unsupporting contentions are unacceptable.

4. Learned counsel appearing for the defendant further contended that there was no amount due as such, as claimed in the Plaint. He strongly relied on the material, basically receipts, on the record to justify that there was no balance amount which was required to be paid by the defendant. The learned counsel appearing for the plaintiff, however, disputed the same by an Affidavit opposing this Notice of Motion. This controversy, therefore, cannot be taken note of at this stage of the proceedings.

5. Learned counsel appearing for the defendant further strongly relied on Order XXXVII Rule 4 and contended that if a case is made out and sufficient reason shown, then this Court can consider to set aside such exparte order and pass appropriate and reasonable order. As noted above, in view of the disputed position and facts, it is difficult to consider the case of the defendant on this foundation on merit also.

6. The last submission made by the counsel

appearing for the defendant was that why party should be negligent in dealing in matters like this. There was no intention as such not to contest the present litigation specially when there was no amount payable. I am not impressed by this submission also.

7. Considering the averments made in the Affidavit in support of the Notice of Motion itself, I am not inclined to grant the discretionary relief of condoning the delay in setting aside the exparte order after 8 years from the date of the exparte decree.

8. In view of the above, there is no case made out. This Notice of Motion is, therefore, dismissed. No costs.

Sd/-
[ANOOP V. MOHTA, J.]